IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No.

GEORGE A. COLE, ED. MALLEY, GILBERT C. ROSS, J. J. HEALEY, GUY DAVIS, GEORGE B. THATCHER AND WILLIAM FORMAN, PETITIONERS,

vs.

JOSEPH RALPH, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The petition of George A. Cole, Ed. Malley, Gilbert C. Ross, J. J. Healey, Guy Davis, George B. Thatcher, and William Forman respectfully shows:

The petitioners are the claimants of the Guy Davis placer mining claim, located September 26, 1913, which conflicts with the alleged Salt Lake No. 3 lode mining claim, located February 2, 1897. (See diagram, Record, p. 1279, and 249 Fed., 84.)

After injunction proceedings in which the petitioners were restrained from working the Guy Davis placer, the respondent on August 1, 1914, filed application for patent for the said alleged lode claim, and adverse claim on behalf of the Guy Davis placer was duly filed and followed by adverse suit in the proper State court (Nevada), filed September 30, 1914, which was removed to the United States District Court for the District of Nevada.

The adverse suit was in the form of an action for possession and for decree declaring the petitioners to be the owners of the Guy Davis placer (R., p. 15, 249 Fed., 81-82).

In his answer the respondent denied the validity of the Guy Davis placer claim, set up the validity of the alleged Salt Lake No. 3 lode claim, and pleaded as to such alleged lode claim that from the time of location thereof until the 8th day of September, 1913 (date of location of the Guy Davis placer), he and his grantors were in the open, notorious, adverse and undisputed possession thereof, holding, working and living thereon (R., pp. 20-26).

This and the companion case between the same parties involving the adverse of the Homestake placer against the alleged Midas and Evening Star lode claims, involving the same issues, were consolidated for trial.

The petitioners, as plaintiffs, contended that the alleged lode claims were void for want of discovery, and introduced evidence tending to prove that no lode or vein had been discovered or was known to exist within the limits of any of the alleged lode claims up to the time the placer locations were made.

The respondent introduced the testimony of parties who made the locations of the alleged lode claims and other witnesses (including the respondent himself, a mining engineer) as to alleged discovery or existence of veins or lodes, and also testimony tending to show that possession of the alleged lode claims had been maintained from the time of location thereof and that considerable work in the way of excavations, shafts, tunnels, etc., had been done and im-

provements made in the way of buildings thereon, and contended ultimately that the local statute of limitations of Nevada applying to mining claims had operated as a statute of repose to perfect title to the alleged lode claims and foreclose inquiry into the question of discovery supporting the same.

At the close of the testimony the petitioners, as plaintiffs, submitted prayers for instructions upon the question of what constituted discovery sufficient to support a lode location (R., pp. 1202-1208).

The respondent, as defendant, submitted (R., p. 1208 *et seq.*) various prayers upon the subject of title by adverse possession, two of which incorporated discovery as an essential element (R., p. 1213 at bottom, and p. 1218 at top of 1219, the latter appearing as No. 17, R., p. 89-90) and others of which ignored discovery as an essential element (No. 6, R., p. 83; No. 8, R., p. 84; No. 16, R., p. 89), and also prayers upon the subject of discovery.

The trial judge made the following announcement (R., p. 1202):

> "I don't think there is any adverse possession in the case, so the instructions based on adverse possession will not be given; I exclude them, not because they do not correctly state the law, but simply because I regard them as unnecessary. The instructions with reference to assessment work will be eliminated with this statement: The plaintiffs have tendered no issue as to the performance of the assessment work, therefore they cannot recover in this case solely on the ground that there was a failure to perform the assessment work,"

and at the close of the argument instructed the jury that it appeared, and was conceded by both parties, he thought, that not only the lode locations, but the placer locations, were properly staked, notices placed, and certificates which complied with the law duly recorded, and that there was no question as to the doing of assessment work by the lode

claimants, and that practically the only question was whether valid discoveries had been made on the alleged lode claims prior to the times when the conflicting placers were located (R., pp. 1225, 1232), that without discovery there is no location (R., p. 1225), as to what constitutes a lode or vein within the meaning of lode mining law (R., p. 1230), and that each party was in a sense an actor and the burden was on each to establish the validity of his own location (act of March 3, 1881, 21 Stat., 503), but that the burden was on the plaintiffs in the first instance to show that when they went on these claims to locate the placers the ground was open to location and that there were at that time no valid subsisting locations where their discoveries were made and their notices posted (R., p. 1236).

The jury returned general verdicts for the plaintiffs and (under local Nevada practice) three special verdicts finding that no valid discovery of a lode or vein had been made within the limits of any of the alleged lode claims prior to the time of conflicting placer location (R., pp. 32-34), and judgment was entered for the plaintiffs, petitioners here.

The cases went, on bills of exceptions, to the United States Circuit Court of Appeals for the Ninth Circuit, which, on March 8, 1918, by opinions and judgments (R., p. 1272 *et seq.*; 249 Fed., 81) reversed the judgments below and remanded the cases for a new trial.

On April 3, 1918, the petitioners filed in said court a petition for rehearing which on May 13, 1918, was denied (R., p. 1308).

The main opinion (per Ross, Circuit Judge), read in the light of the record, resolves into the ruling that notwithstanding the trial court instructed the jury that practically the only question was whether the lode locations were supported by discoveries made at any time up to the date of placer location, and gave the usual proper instructions on the subject of discovery, nevertheless "some" of the requested instructions on the subject of title by adverse hold-

ing under the Nevada statute (which the trial court held unnecessary) should have been given to the jury.

As the opinion recognized discovery as an essential element, the instructions referred to generally as "some" necessarily are those, *supra,* in which discovery was included as an essential element.

The later suggestion that recitals in the notices of location of the fact of discovery created a presumption of discovery of mineral, was not decisive of any question presented by the record, inasmuch as the respondent did not ask any such instruction and no exception to the court's charge or otherwise presented that question.

The concurring opinion of Hunt, Circuit Judge (R., p. 1298; 249 Fed., 93), after quoting the prayer designated as No. 16, *supra,* as follows:

> "The court instructs the jury that if you find from the evidence that the defendant and his grantors had entered and held possession of the lode mining claims involved in these actions, and worked the same in the usual and customary way in the vicinity thereof for a period of two years prior to the making of the placer locations of the plaintiffs, then the law presumes in aid thereof that all the acts necessary to a valid location of said lode mining claims had been done and performed at the time of such lode mining locations, and that such possession (having the legal effect of a location under the law) is sufficient to give the defendant's grantors a lawful right to the possession of said mining claims, if kept alive as required by law, as against the subsequent placer locations of the plaintiffs' grantors,"

and the statement of the trial judge declining to give instructions based on adverse possession, *supra,* and likewise conceding that discovery is an essential element, concurred with the main opinion in holding that refusal to instruct upon the question of adverse possession was error, but, in undertaking to state grounds therefor, disclosed that the supposed error was not in respect of the prayers regarding

adverse possession, but in instructing the jury regarding discovery and burden of proof on that issue.

The argument of the concurring opinion is that conceded possession for years, posting and filing of proper location notices, and doing of annual assessment work and much additional expenditure, *testimony of witnesses to facts tending to show the existence of veins or lodes at the time of original location,* and conceded general mineral character of the country, "made a strong *prima facie* conclusion as against the placer claimants in favor of discovery by defendant."

It will be appreciated that testimony to facts tending to show the existence of veins or lodes at the time of original location would *per se* make a *prima facie* case of discovery. But the trial judge did not limit the issue to whether there was a valid discovery at the time of original location. He instructed the jury that discovery at any time before the placers were located would validate the alleged lode locations.

But, assuming that the concurring opinion holds that a presumption of discovery arises from location, long-continued possession and assessment and other work, no exception reserving that point can be found in the record. None of the defendant's prayers requested the court so to instruct the jury. All of the prayers on the subject of adverse possession which omitted discovery as an essential element, presented the proposition that two years' possession, claim and work prior to the placer locations, perfected title by force of the Nevada statute, that is, dispensed with proof of discovery. And the defendant's exceptions to the charge of the court as given (R., pp. 1237-1240) or to the admission of evidence reserved only the point that the Nevada statute operated as a statute of repose to lay at rest the question of discovery.

Moreover, the petitioners, as paintiffs, assumed the burden of proof, and presented their evidence tending to prove absence of discovery supporting the lode claims, thereby making a *prima facie* case against discovery, the respondent then

presented all his available evidence on the subject, and the court instructed the jury that the burden was on the plaintiffs in the first instance to show that the alleged lode claims were invalid; so that there was no room for any presumption on the subject of discovery.

The dissenting opinion of Gilbert, Circuit Judge (R., p. 1301; 249 Fed., 95), recognizing that, however faulty might be the grounds assigned therefor in the main and concurring opinions, the effective ruling of those opinions was that error was committed in refusing to give the instructions requested by the defendant on the subject of title by adverse possession by force of the Nevada statute, pointed out that the defendant had pleaded adverse possession, but not in the language of the Nevada statute, in that the allegation was "open, notorious, adverse and undisputed possession of said mining claim, holding, living and working upon said lode mining claim," whereas the Nevada statute provided that "occupation and adverse possession of a mining claim shall consist in holding and *working the same in the usual and customary mode of holding and working similar claims in the vicinity thereof;*" that there was no evidence that the alleged lode claims had ever been worked "in the usual and customary mode of holding and working similar claims," or had ever been worked at all; that all the proof of work done on the alleged lode claims prior to the placer locations was proof to show that annual assessment work had been done, consisting of sinking shafts and excavating tunnels, in none of which, and nowhere on any of the claims, was an ore body developed or any ore ever taken, and in none of which was there any "working" of a claim; that the statute of Nevada can avail the holder of a mining claim by adverse possession only upon the theory that the claim has been shown to be a workable claim and that the act of working it involves discovery and stands for proof of discovery; and that the decision of the majority commits the court to the proposition that in Nevada mining land, or indeed any land, may be acquired as against all except the United States by

filing a location notice, marking the ground and doing annual assessment work for two years, without making a discovery; that if such had been the intent of the Nevada act it would be void as violative of the fundamental doctrine of the mining law, that one who locates and occupies and does annual assessment work on mineral land, cannot hold the same against another who peaceably, and not fraudulently or clandestinely, locates the ground and is the first to make discovery thereon, citing section 2320, U. S. R. S., and numerous cases, and quoting from Humphrey *vs.* Idaho Gold Mines Dev. Co. (21 Idaho, 126; 120 Pac., 823), where the true doctrine is stated.

The dissenting opinion also pointed out that Vogel *vs.* Warsing, 146 Fed., 948, 951, and other cases cited in the main opinion of Ross, Circuit Judge, have no application to the present case for that here there was no room for the indulgence of a presumption of discovery, because the question of discovery by the lode claimants was directly placed in issue and was the principal issue in the case, the defendant presented all his available testimony to show actual discovery, and the jury by special verdicts on that issue alone found that there was no discovery.

The petitioners submit that, however the two concurring opinions be construed, the reversal of the judgment of the trial court was manifest error in that the case was properly submitted to the jury, and the defendant's exceptions to the admission of evidence, to the refusal of the court to give instructions by him requested, and to the charge of the court as given, were not well taken; and that such reversal, which necessarily must be regarded as based upon the exceptions reserved, presents fundamental questions under the federal mining law of general public interest and concern, of which this court should take cognizance by writ of certiorari, viz:

1. Whether error was committed in refusing to give instructions on the subject of adverse possession which incorporated proof of discovery as an essential element, when

the court instructed the jury that the only question was whether the alleged lode claims were supported by discovery;

2. Whether error was committed in refusing to give instructions on the subject of adverse possession which omitted mention of discovery as an essential element; which resolves into

a. Whether the Nevada statute undertakes in terms or effect to dispense with proof of discovery as an essential element, and

b. Whether such statute so construed would be void as inconsistent with, and violative of, the fundamental principle of the federal mining law, that discovery is a precedent condition and essential element of a mining claim.

These questions involve the effect and operation of section 2320, U. S. R. S., which declares that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," and section 2332, U. S. R. S., which provides:

> "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim."

The Nevada Statute in question (Act of Nov. 21, 1861, as amended in 1867; Cuttings Compiled Laws of Nevada, 1861-1900, Par. 3706, Sec. 4), provides:

> "No action for the recovery of mining claims, or for the recovery of the possession thereof, shall be

> maintained, unless it appear that the plaintiff, or those through or from whom he claims, were seized or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within two years before the commencement of such action. Occupation and adverse possession of a mining claim shall consist in holding and working the same, in the usual and customary mode of holding and working similar claims in the vicinity thereof. All provisions of this act, which apply to other real estate, so far as applicable, shall be deemed to include and apply to mining claims: Provided, that in such application 'two years' shall be held to be the period intended whenever the term 'five years' is used; and provided, further, that when the terms 'legal title' or 'title' are used, they shall be held to include title acquired by location or occupation, according to the usages, laws, and customs of the district embracing the claim."

It is settled that State statutes repugnant to the federal mining law are void (Belk *vs.* Meagher, 14 Otto, 279; 26 Law Ed., at p. 738; Butte City Water Co. *vs.* Baker, 196 U. S., 119, 126), and that section 2332, U. S. R. S., does not, and that a State statute cannot, dispense with discovery, is recognized by both the concurring opinions in the court below; but, in the absence of any exceptions presenting the other questions passed on in those opinions, the reversal of the judgment of the trial court operates to the contrary.

The further questions, not presented by any exceptions in the record but which are passed upon in the two concurring opinions and the rulings upon which therein the trial court would no doubt feel bound to respect in case the new trial ordered were to be had, also go to fundamental principles of the federal mining law of general public interest and concern, viz:

1. Whether recital in a location notice or certificate creates a presumption of discovery of mineral.

On this point there is a conflict of ruling between the opinion of Ross, Circuit Judge, and decisions of the Supreme Court of Nevada (Round Mountain Mining Co. *vs.* Round Mountain Sphinx Mining Co., 36 Nev., 546, 560, and Fox *vs.* Myers, 29 Nev., 169, 186), and the highest courts of other states in cases cited in the accompanying brief, and the Circuit Court of Appeals for the Ninth Circuit (same court, per Gilbert, Circuit Judge) in Thomas *vs.* South Butte Mining Co., 211 Fed., 105.

2. Whether long-continued possession, claim, and work or improvement, create a presumption of discovery (concurring opinion of Hunt, Circuit Judge), and, in particular, whether there is any room for such presumption where, as here, the attacking party has the opening and makes a *prima facie* case against discovery, and the defendant produces the parties who made the locations to testify to alleged discoveries, and all other available evidence as to alleged discovery up to the time the placers were located. On this point there is a conflict of ruling between the opinion of Hunt, Circuit Judge, and the ruling of the same court in Thomas *vs.* South Butte Mining Co., *supra.*

3. Whether, on the contrary, long-continued possession of an alleged lode mining claim without development of any mine therein, raises a presumption against the discovery or existence of a vein or lode therein, as held by the land department (Purtle *vs.* Steffee, 31 L. D., 400; Brophy *vs.* O'Hare, 34 L. D., 596).

Wherefore, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said

case, entitled Joseph Ralph, plaintiff in error, *vs.* George A. Cole, Ed. Malley, Gilbert C. Ross, J. J. Healey, Guy Davis, George B. Thatcher, and William Forman, defendants in error, No. 2952, to the end that said case may be reviewed and determined by this court, as provided by section 240, Judicial Code, and that your petitioners may have such other and further relief or remedy in the premises as the court may deem appropriate and in conformity with said provisions of the Judicial Code, and that said Judgment of said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this honorable court.

GEORGE B. THATCHER,
WILLIAM C. PRENTISS,
Attorneys for Petitioners.

(Brief in support of both petitions is printed with the petition in the other case involving the conflict between the Homestake placer and the alleged Midas and Evening Star lode claims.)

Office Supreme Court, U.
FILED
OCT 1 1919
JAMES D. MAHER,
CLERK

Nos. 172
173

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE A. COLE, ED. MALLEY, GILBERT C. ROSS, *et als.*, *Petitioners,*

vs.

JOSEPH RALPH, *Respondent.*

OCTOBER TERM, 1919

[redacted]

MOTION

MOTION TO ADVANCE

Come now the Petitioners and the Respondent, Joseph Ralph, and move and petition the Court to advance the above-entitled causes for argument to an early date upon the grounds more fully set forth in the affidavit of Geo. B. Thatcher filed herein.

DATED: September 2, 1919.

GEO. B. THATCHER,
WM. C. PRENTISS,
Attorneys for Petitioners,
GEORGE A. COLE, *et als.*

P. G. ELLIS,
Attorney for JOSEPH RALPH,
Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE A. COLE, ED. MALLEY, GILBERT C. ROSS, *et als.*, *Petitioners*, *vs.* JOSEPH RALPH, *Respondent.*	OCTOBER TERM, 1919 No. 568, No. 569

UNITED STATES OF AMERICA,
STATE OF NEVADA, } *ss:*
COUNTY OF WASHOE.

GEO. B. THATCHER, being first duly sworn, deposes and says: That he is one of the petitioners in the above-entitled action and one of the attorneys for petitioners; that the mining claims in controversy in the above-entitled actions are situated in what is commonly known and called Copper Canyon, Lander County, Nevada; that the placer deposits therein can only be worked with water by means of sluicing and that water is scarce in that vicinity, the only substantial flow being in the early spring in the months from February to May; that unless the above-entitled causes be heard and decided by the middle of January, 1920, it will be impossible to install the necessary machinery and pipe-lines and obtain the water for working of the same for the year 1920 and very little work will be able to be done on said placer deposits until 1921; that both parties to the above-entitled actions are enjoined from working on the premises until final decision; that the above-entitled

causes have been pending in the various courts of the United States since September, 1914, during all of which time no work has been done, all of which will occasion great loss to the prevailing party in the action. Affiant further states that certain parties, unknown to the affiant, have been and now are surreptitiously and clandestinely entering in and upon said placer claims, taking and extracting therefrom large amounts of gold and placer gravel; that it is practically impossible to protect said ground from such invasions except during the course of active operations.

WHEREFORE affiant prays on behalf of petitioners that said causes be advanced for argument and hearing to as early a date as possible.

GEO. B. THATCHER.

Subscribed and sworn to before me this 2d day of September, 1919.

OHELINE SOUCHEREAU,
Notary Public.

(SEAL)